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No. _____

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In The

Supreme Court of the United States

JOAN GORE MILLIGAN,
Individually and for the benefit and on behalf of all others similarly situated,
Petitioner,

v.

STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF REVENUE; MURIEL K. OFFERMAN, in her capacity as Secretary of the North Carolina Department of Revenue; RICHARD W. RIDDLE, in his capacity as Director of the Controlled Substance Tax Division of the North Carolina Department of Revenue; THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER; HARLAN E. BOYLES, in his capacity as Treasurer of the State of North Carolina,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

Petition for Writ of Certiorari

Stanley F. Hammer
Counsel of Record
Scott F. Wyatt
WYATT EARLY HARRIS & WHEELER, L.L.P.
1912 Eastchester Drive
Suite 400
High Point, North Carolina 27261
(336) 884-4444

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

26 pp

QUESTIONS PRESENTED

I. WHETHER THE NORTH CAROLINA SUPREME COURT PROPERLY APPLIED THIS COURT'S HOLDING IN *DEPARTMENT OF REVENUE OF MONTANA v. KURTH RANCH* IN CONCLUDING THAT THE STATE DRUG TAX IS NOT A CRIMINAL PENALTY, NOTWITHSTANDING THAT THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS EXAMINED THE DRUG TAX IN LIGHT OF *KURTH RANCH* AND DETERMINED THAT IT IS A CRIMINAL PENALTY WHICH MAY NOT BE ASSESSED WITHOUT CONSTITUTIONAL SAFEGUARDS?

II. WHETHER THE FEDERAL SUPREMACY CLAUSE REQUIRES THE NORTH CAROLINA SUPREME COURT TO FOLLOW THE CONSTITUTIONAL PRINCIPLES ENUNCIATED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT , WHERE THAT CIRCUIT COURT HAS REVIEWED THE NORTH DRUG TAX IN LIGHT OF THE DUE PROCESS CLAUSE AND THE PRINCIPLES ANNOUNCED BY THIS COURT IN *DEPARTMENT OF REVENUE OF MONTANA v. KURTH RANCH,* AND HAS RULED THAT THE NORTH CAROLINA DRUG TAX IS A CRIMINAL PENALTY?

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Petitioner Joan Gore Milligan ("Milligan"), respectfully requests that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals issued on 7 December 1999, which affirmed the trial court's dismissal of Milligan's civil cause of action seeking tax refunds based upon a challenge to the constitutionality of the North Carolina's Drug Tax, N.C. Gen. Stat. §105-113.105 *et seq.* (1996). (App. to Pet. for Cert. pp. 28-29) The North Carolina Supreme Court dismissed Milligan's appeal and denied her Petition for Discretionary Review on 2 March 2000. 351 N.C. 358, ____ S.E.2d _____, 2000 WL 284442 (March 02, 2000) (App. to Pet. for Cert. pp. 3-5)

OPINIONS BELOW

The North Carolina Supreme Court's dismissal of Milligan's appeal and denial of her Petition for Discretionary Review is reprinted in the Appendix, p.3. The opinion of the North Carolina Court of Appeals from which Milligan appealed and now seeks certiorari, *Milligan v. State*, ___ N.C. App. _____, 522 S.E.2d 330 (1999) appears in the Appendix, pp. 5-9. Milligan's original Complaint and Amendment thereto appear in the Appendix, pp.12-27.

BASIS FOR JURISDICTION

The judgment of the North Carolina Court of Appeals affirming the dismissal of Milligan's cause of action as set forth above was filed on 7 December 1999, ____ N.C. App. _____, 522 S.E.2d 330 (1999). (App. to Pet. Cert. pp. 5-9) A Notice of Appeal and Petition for Discretionary Review were timely filed with the North Carolina Supreme Court on 24 January 2000. The Notice of Appeal was dismissed and the Petition for Discretionary Review denied on 2 March 2000. 351 N.C. 358, ____ S.E.2d ____, 2000 WL 284442 (March 02, 2000). This Petition is filed within ninety (90) days of dismissal of Milligan's appeal and denial of her Petition for

Discretionary Review to the Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rules 10, 12, 13, 14, 15, and 16 of the Rules of the *Supreme Court of the* United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved herein are:

U.S. Const. art. VI cl.2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.Const. Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.Const. Amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S.Const. Amend. XIV, Sec. 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The North Carolina Drug Tax, N.C. Gen. Stat. §105-113.105 *et seq.* (1996) is reprinted in the Appendix pp. 27-39.

STATEMENT OF THE CASE

Milligan sought tax refunds in North Carolina state court pursuant to N.C. Gen. Stat. §105-267 (App. to Pet. for Cert. p. 40) on behalf of herself and the class she seeks to represent. She alleged that the North Carolina Drug Tax, N.C. Gen. Stat. §105-113.105 *et seq.* (1996) is unconstitutional in that it is in fact a criminal penalty, yet those from whom the tax is collected are not provided constitutionally guaranteed procedural safeguards. The North Carolina Attorney General, acting on behalf of the North Carolina Department of Revenue, successfully moved to dismiss Milligan's claim on the basis that she failed to state a claim for relief.

The North Carolina Court of Appeals affirmed the trial court's dismissal of the claim and the North Carolina Supreme Court dismissed Milligan's appeal and denied her petition for discretionary review.

STATEMENT OF THE FACTS

Milligan's amended complaint alleges that the North Carolina Drug Tax, as enforced, is a criminal penalty, that Milligan and others similarly situated were not afforded appropriate procedural safeguards, and therefore enforcement of the North Carolina Drug Tax violates federal and state constitutional provisions guaranteeing due process of law. (App. to Pet. Cert. pp.11-26).

On September 23, 1996, Respondent North Carolina Department of Revenue assessed a $12,252.95 tax liability

against Milligan for drugs which had earlier been seized by law enforcement officials and which were not in her possession at the time of assessment. Milligan was arrested and charged criminally for possessing the same drugs on which her tax liability was based. She filed a timely objection challenging the constitutionality of the Drug Tax assessment, and paid $8,000.00 as a penalty on March 4, 1998. On March 26, 1998, Milligan timely sent a written protest and demand to the Secretary of the Department of Revenue, demanding a refund on the tax paid. The protest specifically alleged that the North Carolina Drug Tax was unconstitutional, based upon the opinion of the United States Court of Appeals for Fourth Circuit in *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998) which held in pertinent part that "North Carolina's Drug Tax, like Montana's Dangerous Drug Tax, has enough punitive features that its nature is that of a criminal penalty, not a civil tax." *Id.* at 589. When the taxes were not refunded, Milligan commenced action in state court.

Milligan's amended complaint alleges that the North Carolina Drug Tax and the actions of the Respondents in enforcing that tax have been arbitrary and capricious and not in accordance with safeguards which attach when a state seeks to enforce a criminal penalty. Her complaint alleges violations of the United States Constitution (primarily the Fourth, Fifth, Sixth, and Fourteenth Amendments), and seeks a refund of all taxes which were unlawfully collected as part of the enforcement of the North Carolina Drug Tax. The trial court dismissed the complaint for failure to state a claim for relief.

The North Carolina Court of Appeals affirmed, holding that

> This Court has held that the Drug Tax does not contain the "punitive characteristics" necessary to transform it into a criminal

> penalty. *State v. Ballenger*, 123 N.C. App. 179, 184, 472 S.E.2d 572, 575 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d84, *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997); *see also State v. Adams*, --- N.C. App. ---, 513 S.E.2d 588, *disc. review denied*, 350 N.C. 836, --- S.E.2d --- (1999); *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997).

522 S.E.2d at 331 (App. to Pet. for Cert. p. 7-8)

The North Carolina Court of Appeals also addressed the Fourth Circuit's ruling that the North Carolina Drug Tax is a criminal penalty:

> We are aware the Fourth Circuit has held the North Carolina Drug Tax to constitute a criminal penalty. *Lynn*, 134 F.3d at 592. We are not, however, bound by that decision. *Adams*, --- N.C. App. at ---, 513 S.E.2d at 589; *see also State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

522 S.E.2d at 331 FN 2. (App. to Pet. for Cert. p. 8)

The North Carolina Supreme Court dismissed Petitioner's appeal and denied her petition for discretionary review.

REASONS FOR GRANTING THE WRIT

1. **Certiorari should be granted because the North Carolina Supreme Court has interpreted a federal constitutional question in a manner which directly conflicts with a ruling of the United States Court of Appeals for the Fourth Circuit, which consistently rules on matters of North Carolina law.**

It is important for this Court to grant certiorari in order to resolve a direct and recurring conflict between the United States Court of Appeals for the Fourth Circuit on the one hand, and North Carolina appellate courts on the other. Additionally, it is important for this Court to finally determine whether the federal Supremacy Clause, U.S. Const. Article VI., cl.2, requires that the state court follow the constitutional rulings of the federal circuit in which the state court is located.

A. The Conflicting Interpretations of North Carolina's Drug Tax

The Fourth Circuit has held that the North Carolina Drug Tax, when evaluated in light of the test applied by this Court in *Department of Revenue of Montana v.Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1996), amounts to a criminal penalty which may not be imposed without constitutional safeguards. In *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. denied*, 525 U.S. 813, 119 S.Ct. 47 (1998) the Fourth Circuit analyzed the Drug Tax and concluded:

> [T]he Drug Tax contains no features that allow us to distinguish *Kurth Ranch*. The rate of taxation is even steeper than the tax in

> *Kurth Ranch*. Unlike the application of a normal income tax on illegal activity, the Drug Tax is enforced only against criminals. [footnote omitted] And unlike the marijuana tax upheld in *Sanchez*, the Drug Tax does not contemplate lawful dealings in the product that is the subject of the tax. The Drug Tax singles out a class of persons who have engaged in criminal activity and subjects the class to a rate of taxation far beyond that faced by any legitimate taxpayer.

134 F.3d at 592.

The North Carolina appellate courts, on the other hand, consistently hold that the North Carolina Drug Tax contains features which distinguish it from the tax which this Court characterized as a penalty in *Kurth Ranch*, *supra*. In the most exhaustive analysis of the Drug Tax by a North Carolina appellate court, a panel of the Court of Appeals in *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572, *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84 (1997), *cert. denied*, 522 U.S. 817, 118 S.Ct. 68, 139 L.Ed2d (1997) held that the North Carolina Drug Tax is distinguishable from the tax which this Court held to be a penalty in *Kurth Ranch*. The panel concluded,

> The North Carolina Controlled Substance Tax, G.S. § 105-113.105 *et seq*., as it was in effect at all times pertinent to this case, however, contains neither of the "unusual features" upon which the Supreme Court relied in *Kurth Ranch* to conclude that Montana's dangerous drug tax constituted punishment for double jeopardy purposes. The North Carolina Controlled Substance Tax is not predicated upon whether the taxpayer in

possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed. Specifically, the North Carolina Controlled Substance Tax provides that a "tax is levied on controlled substances and counterfeit controlled substances possessed by dealers ..." at various rates depending on the type of controlled substance possessed. N.C. Gen.Stat. § 105-113.107 (1992). A dealer is defined as:

> [a] person who in violation of G.S. 90-95 possesses, delivers, sells, or manufactures more than 42.5 grams of marijuana, seven or more grams of any other controlled substance or counterfeit controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance or counterfeit controlled substance that is not sold by weight.

N.C. Gen.Stat. § 105-113.106 (1992 & 1994 Cum.Supp.)

The panel distinguished the tax held to be a penalty in *Kurth Ranch:*

> Because the North Carolina tax becomes payable within forty- eight hours after the taxpayer comes into possession of the substance, it is not a tax on confiscated goods,

> as was the case with the Montana tax, which became due only upon the taxpayer's arrest for pos-session of the substance. To the contrary, the dealer is not required, when paying the tax, to disclose his or her identity, G.S. § 105-113.108, and any information obtained pursuant to this statute is confidential and cannot be used in a criminal prosecution other than a prosecution for failure to comply with the tax statute itself. N.C. Gen.Stat. § 105-113.112 (1992 & 1994 Cum.Supp.)

123 N.C. App. at 179, 472 S.E.2d at 572.

The tension between *Lynn* and *Ballenger* (and its progeny) has produced a series of state court decisions in which North Carolina courts refuse to adopt the constitutional analysis employed by the United States Court of Appeals for the Fourth Circuit. A brief review of these decisions is in order.

In *State v. Adams,* 132 N.C.App. 819, 513 S.E.2d 588, *cert. denied,, Adams v. North Carolina,*____ U.S.____, 120 S.Ct. 534, _____ L.Ed.2d _____ , 68 U.S.L.W. 3292 (1999) a criminal defendant argued in state court that the North Carolina Drug Tax was a criminal penalty and thus the state's prosecution after its assessment of the tax violated the Double Jeopardy clause; a state trial court agreed and dismissed the prosecution, relying on the Fourth Circuit's decision in *Lynn.* The North Carolina Court of Appeals reversed and refused to follow *Lynn,* noting that:

> Defendant does not dispute that *[State v.] Ballenger* and *[State v.] Creason* upheld assessment and collection of the Drug Tax pursuant to G.S. Sec. 105-113.105 through 105-113.113 against a constitutional chal-

> lenge indistinguishable from that mounted by defendant herein. [citations omitted] Notwithstanding, in his appellate brief and at oral argument, defendant proffered the decision of the United States Court of Appeals for the Fourth Circuit in *Lynn v. West*, 134 F.3d 582 (4th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998), as sustaining the trial court's action. However, with the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State. See *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[ ] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

132 N.C. App. at 820, 513 S.E.2d at 588. See also, *State v. Woods*, _____ N.C. App. _____, 524 S.E.2d 363, *rev. denied*, ____ N.C. ____, ____S.E.2d _____ (2000) (rejecting defendant's contention that drug tax is a penalty and refusing to follow *Lynn v. West); State v. Wambach* ____ N.C. App. _____, 526 S.E.2d 212 (2000) (dismissing habeas corpus appeal and noting that in connection with *Lynn*, "federal appellate decisions are not binding upon either the appellate or trial courts of this State.") *State v. Foster*, 132 N.C. App. 823, 519 S.E.2d 783, *rev. denied*, 350 N.C. 840, ____ S.E.2d ____, *cert. denied*, 120 S.Ct. 534, 145 L.Ed.2d 414 (1999). Likewise, in the present case, the North Carolina appellate courts affirmed the dismissal of Milligan's cause of action on the basis of *Ballenger, supra* and *Adams, supra*, and refused to follow *Lynn v. West, supra. Milligan*, __ N.C.

App. at __, 522 S.E.2d at 331-32 (App. to Pet. for Cert. pp. 5-8).

The Fourth Circuit explicitly rejects both the holding and reasoning the North Carolina Court of Appeals' decision in *Ballenger* and subsequent cases, all of which have been affirmed without opinion by the North Carolina Supreme Court. See, *Lynn v. West,* 134 F.3d 582, 591 (rejecting North Carolina Attorney General's argument based upon *Ballenger); United States v. Anderson,* 2000 WL 620308 (4th Cir. May 15, 2000) , reprinted in Appendix to Petition at pp.40-47, (refusing to apply *Ballenger* and noting that "in this forum to say the least, *Lynn v. West* is binding").

The foregoing decisions underscore the recurring tension between North Carolina state courts and the Fourth Circuit on a constitutional question which implicates both the Due Process and Double Jeopardy clauses. The repeated certiorari petitions in which litigants have requested this Court to review North Carolina's Drug Tax in light of *Kurth Ranch* reflect a compelling need for this Court to resolve the state-federal conflict which has developed in connection with the North Carolina Drug Tax.

This Court has repeatedly refused to grant certiorari in cases where state litigants have challenged the North Carolina Drug Tax. See e.g., *State v. Ballenger, supra; State v. Adams, supra; State v. Foster, supra.* Yet this Court has also refused to grant certiorari in response to the Fourth Circuit's decision that the North Carolina Drug Tax constitutes a criminal penalty. *Lynn v. West. supra.* Petitioner respectfully submits that this Court is the only Court empowered to finally resolve the conflict between the Fourth Circuit and the North Carolina appellate courts in their respective interpretations of the Due Process and Double Jeopardy clauses of the United States Constitution.

The split between the Fourth Circuit and the North Carolina appellate courts is not a mere academic disagreement, but rather a division with significant practical implications. For example, in *United States v. Anderson,*

2000 WL 620308 (4th Cir. May 15, 2000) (App. to Pet. for Cert. pp. 40-47), a federal criminal defendant was sentenced to life in prison, based upon his having been twice convicted of felony drug offenses in North Carolina. On appeal the defendant argued that one of the predicate drug convictions used to enhance his federal sentence was obtained in violation of the Double Jeopardy clause, inasmuch as he had been assessed the Drug Tax prior to his state drug conviction. The Fourth Circuit agreed with the defendant's contention and found that the previous state drug conviction could not be used to enhance defendant's sentence. The Fourth Circuit's reasoning dramatically emphasizes the nature of the federal-state conflict:

> Prior to Anderson's conviction on the drug charge, North Carolina courts had determined that the North Carolina drug tax was not a criminal penalty for purposes of the Double Jeopardy Clause. See *State v. Ballenger*, 472 S.E.2d 572, 572-75 (N.C.Ct.App.1996), *aff'd per curiam*, 481 S.E.2d 84, *cert. denied*, 522 U.S. 817 (1997); *State v. Creason*, 473 S.E.2d 771, 772 (N.C.Ct.App.1996), *aff'd per curiam*, 484 S.E.2d 525 (1997). A subsequent North Carolina case even pointed out that state courts were not bound by the Fourth Circuit *Lynn v. West* decision, but rather were bound by the state court pronouncements on the matter. See *State v. Adams*, 513 S.E.2d 588, 589 (N.C.Ct.App.1999).
>
> *In this forum, to say the least, Lynn v. West is binding. And pursuant to Lynn v. West Anderson's subsequent North Carolina drug conviction constituted double jeopardy.* As a result, the conviction cannot be used as a predicate offense under § 841(b)(1)(A). We

> thus vacate Anderson's sentence and remand for resentencing under the applicable sentencing guidelines.

United States v. Anderson, 2000 WL 620308,(App. to Pet. for Cert. p. 46)(emphasis supplied)

Undoubtedly many federal and state prisoners have been convicted of North Carolina felony drug offenses after a Drug Tax assessment. In light of *Lynn v. West,* and *United States* v. *Anderson,* federal and state prisoners will continue to attack the validity of felony drug convictions obtained after a defendant has been assessed the Drug Tax. Only this Court has the power and authority to *finally* resolve the issue which has divided the state and federal courts--that is, whether the North Carolina Drug Tax is a criminal penalty when viewed in light of this Court's opinion in *Kurth Ranch.*

In fact, this Court granted certiorari in *Kurth Ranch* for precisely the same reason advanced here: that Montana's Supreme Court was directly at odds with the federal Ninth Circuit Court of Appeals as to whether Montana's drug tax constituted a criminal penalty. *Kurth Ranch*, 511 U.S. at 775-76, 114 S. Ct. at 1944. As in *Kurth Ranch*, certiorari should be granted in this case because the North Carolina Supreme Court is, and will continue to be, directly at odds with the Fourth Circuit regarding the constitutionality of the Drug Tax.

B. This Court Has Not Squarely Resolved Whether the Supremacy Clause Requires State Courts to Follow The Decisions of Federal Circuit Courts on Matters of Constitutional Law

In *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1992) Justice Thomas criticized the Sixth Circuit's "fundamental misunderstanding" of the Supremacy Clause in that the Circuit Court concluded that an Arkansas court is bound to follow Sixth Circuit precedent on a matter of federal law. Justice Thomas observed:

> In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. See *Steffel v. Thompson*, 415 U.S. 452, 482, n. 3, 94 S.Ct. 1209, 1214, n. 3, 39 L.Ed.2d 505 (1974) (REHNQUIST, J.,concurring); United States ex rel. *Lawrence v. Woods*, 432 F.2d 1072, 1075-1076 (CA7 1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971);

506 U.S. at 375-376, 113 S.Ct. at 846.

This Court has never fully resolved the issue addressed by Justice Thomas in *Fretwell*--whether a state court must follow the constitutional precedent of the federal circuit in which the state court is located. Authorities are divided as to the appropriate precedential value of a federal court's ruling on a question of federal constitutional law. See, 20 Am. Jur.2d, *Courts, § 171* (1995); 21 C.J.S., *Courts, § 158* (1990). This Court should grant certiorari to finally

resolve whether state courts are bound to follow circuit court decisions on matters of federal constitutional law.

2. Certiorari should be granted because the North Carolina Supreme Court has held that North Carolina's Drug Tax is a civil rather than penal statute, thus interpreting the United States Constitution in a manner contrary to this Court's interpretation in *Department of Revenue of Montana v. Kurth Ranch*.

In *Kurth Ranch* this Court analyzed Montana's Drug Tax under Double Jeopardy principles and ruled that it was a criminal penalty in that it: (1) was enacted for a deterrent purpose; (2) imposed a high rate of taxation; (3) was conditioned on the commission of a crime; and (4) had no relationship to a lawful possession of a controlled substance.

Two years after *Kurth Ranch*, the North Carolina Supreme Court adopted the reasoning of the North Carolina Court of Appeals in *Ballenger, supra* and held that North Carolina's Drug Tax is not a criminal penalty for Double Jeopardy purposes because the Drug Tax is not predicated upon the commission of a crime and is not assessed on property that necessarily has been confiscated or destroyed. Accord, *State v. Creason*, 123 N.C.App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 65, 484 S.E.2d 525 (1997). Petitioner has attacked the North Carolina Drug Tax as enforced, and contends that indeed the Drug Tax is enforced only against persons charged with a criminal offense, and always assessed against property that has been confiscated or destroyed. The North Carolina courts have avoided reaching Petitioner's contentions by ignoring the reasoning of the Fourth Circuit and simply relying on the reasoning of the North Carolina Court of Appeals, which interpreted and examined only the facial validity of the Drug Tax.

3. Certiorari should be granted because the federal and state courts have issued conflicting decisions as to the proper interpretation and application of this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*.

This Court's decision in *Kurth Ranch* has been applied in an inconsistent and conflicting manner by federal and state courts, which have reached divergent results in analysis of state drug tax statutes. Several federal and state courts have examined state drug taxes in light of *Kurth Ranch* and concluded that a drug tax, such as North Carolina's, amounts to a criminal penalty: *Lynn v. West*, *supra*; *Desimone v. Nevada*, 996 P.2d 405 (Nev. 2000); *Commissioner of Revenue v. Mullins*, 428 Mass. 406, 702 N.Ed 1(Mass. 1998); *Brunner v. Collection Division of Tax Commission*, 326 Utah Adv. Rep. 26, 945 P.2d 687 (Utah 1997); *Wilson v. Department of Revenue*, 169 Ill.2d 306, 662 N.E.2d 415 (Ill. 1996); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), *cert denied*, 519 U.S. 926, 117 S.Ct. 293, 136 L.Ed2d 2131 (1998); *People v. Maurello*, 932 P.2d 851 (Colo. Ct. App. 1997).

In contrast, other courts reject Double Jeopardy challenges to drug tax statutes similar to North Carolina's, concluding that the drug tax does not impose a criminal penalty. *Padavich v. Thalacker*, 162 F.3d 521 (8th Cir.1998); *Com. v. Bird*, 979 S.W.2d 915 (Ky.1998), *cert denied*, 526 U.S. 1145, 119 S.Ct. 2019, 143 L.Ed2d 1031 (1999); *Covelli v. Commissioner of Revenue Services*, 668 A.2d 699 (Conn. 1995), *cert granted*, 518 U.S. 1031, 116 S.Ct. 2577, 133 L.Ed2d 1096 (1996); *Milner v. State*, 658 So.2d 500 (Ala. Civ. App. 1994); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan.1995); *McMullin v. South Carolina Department of Revenue and Taxation*, 469 S.E.2d 600 (S.C.1996); *Ex Parte Ward*, 964 S.W.2d 617 (Tex.Cr.App. 1998).

This Court should grant certiorari to resolve the conflicting interpretations of the *Kurth Ranch* decision. Principles of constitutional law should be uniformly enforced and not depend on the accident of a citizen's residence.

CONCLUSION

North Carolina's Drug Tax has been declared a criminal penalty by the Fourth Circuit in *Lynn v. West*, *supra*, which conscientiously and correctly applied the teaching of this Court in *Kurth Ranch*. The Fourth Circuit found that North Carolina's Drug Tax contained all of the elements of a criminal penalty. However, the North Carolina Court of Appeals has refused to follow *Lynn v. West* and has instead rested upon its own interpretation of *Kurth Ranch*, while specifically disregarding a federal appellate court's constitutional analysis of a state statute. Certiorari should be granted by this Court to resolve the state-federal conflict and to clarify the precedential effect to be given a federal court's constitutional review of a state statute.

This the 31st day of May, 2000.

Stanley F. Hammer
Counsel of Record for Petitioner

Scott F. Wyatt
Counsel for Petitioner

OF COUNSEL:

Wyatt Early Harris & Wheeler, L.L.P.
P. O. Drawer 2086
High Point, NC 27261-2086
Telephone: 336-884-4444